

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No.

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

---

Ex parte NICOLA CHARLTON

---

Appeal No. 2005-0943  
Application No. 09/947,943

---

ON BRIEF

---

Before FRANKFORT, MCQUADE, and BAHR, Administrative Patent Judge.  
MCQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Nicola Charlton appeals from the final rejection of claims 1 through 9, all of the claims pending in the application.

THE INVENTION

The invention relates to "an esophageal balloon catheter capable of quickly and safely providing esophageal gauging and stenting as well as gastric aspiration during esophageal surgery"

(specification, page 2). Representative claim 1 reads as follows:<sup>1</sup>

1. An esophageal balloon catheter, comprising:
  - (a) a shaft having a proximal end, a distal end and a longitudinal length, and defining a gastric lumen and an inflation lumen;
  - (b) a single inflatable balloon, the inflatable balloon sealingly attached to the shaft at a fixed longitudinal position proximate the distal end of the shaft in fluid communication with the inflation lumen; and
  - (c) an aspiration port through the shaft between the balloon and the distal end of the shaft in fluid communication with the gastric lumen;
  - (d) wherein the gastric lumen is not in fluid communication with the inflation lumen or the balloon.

#### THE REJECTION

Claims 1 through 9 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,314,409 to Sarosiek et al. (Sarosiek).

Attention is directed to the brief (filed May 14, 2004) and answer (mailed July 21, 2004) for the respective positions of the appellant and examiner regarding the merits of this rejection.

#### DISCUSSION

Anticipation is established only when a single prior art reference discloses, expressly or under principles of inherency,

---

<sup>1</sup>The term "the distance markings" in claim 9 lacks a proper antecedent basis, an informality which should be corrected in the event of further prosecution.

Appeal No. 2005-0943  
Application No. 09/947,943

each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984).

Sarosiek discloses an esophageal catheter 10 comprising an elongate outer housing 11, two balloons 30 and 32 disposed in spaced apart relation on the outer surface of the housing, a plurality of ports extending from the interior to the exterior of the housing and six tubular channels located within the housing. Each channel communicates with at least one port:

the balloon channels 22 and 24 communicate with the balloons 32 and 30, through ports not illustrated. Channel 12 communicates with ports 18 and 19. The aspirating channel 14 communicates with port 20 above the upper balloon. Air vent channel 28 communicates with port 21 just below the upper balloon 32. Gastric aspirating channel 15 communicates with the plurality of ports 16, located at the tip or distal end 34 of the catheter [column 3, lines 7 through 15].

As framed and argued by the appellant, the dispositive issue in the appeal is whether Sarosiek meets the limitation in claim 1 requiring the recited catheter to comprise "a single inflatable balloon." According to the appellant, "Sarosiek et al. discloses an esophageal perfusion catheter with at least two balloons . . . [and] does NOT disclose, teach or suggest an esophageal perfusion catheter with a *single* balloon (brief, pages 4 and 5).

Appeal No. 2005-0943  
Application No. 09/947,943

The examiner counters that the "single" balloon limitation is met by either of Sarosiek's balloons 30 and 32. In this regard, the examiner notes that claim 1 is an open-ended "comprising" claim which does not exclude additional unrecited elements such as the extra Sarosiek balloon. The examiner further submits that

Webster's II New Riverside University Dictionary (copyright 1984) defines "single" as separate from others: distinct. The Examiner has interpreted the claim language in the broadest reasonable interpretation with the support of the Dictionary for the term single. Applicant's claim language does not structurally distinguish over the Sarosiek et al. reference. Each of the two balloon[s] of Sarosiek et al. are considered to be single and separate from each other [answer, pages 4 and 5].

As correctly pointed out by the examiner, claim 1 does include the open-ended transition phrase "comprising." In general, claims employing this phrase have a scope which covers devices that employ additional, unrecited elements. AFG Industries Inc. v. Cardinal IG Co., 239 F.3d 1239, 1245, 57 USPQ2d 1776, 1780-81 (Fed. Cir. 2001). Hence, the open-ended nature of claim 1 does not, in and of itself, exclude a catheter having more than one balloon.

Due weight must be given, however, to the unequivocal recitation in claim 1 that the catheter comprises a "single"

Appeal No. 2005-0943  
Application No. 09/947,943

inflatable balloon. During patent examination, the USPTO applies to claim verbiage the broadest reasonable meaning of the words in their ordinary usage as they would be understood by one of ordinary skill in the art, taking into account whatever enlightenment by way of definitions or otherwise that may be afforded by the written description contained in the specification. In re Morris, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997). It is also well settled that the ordinary meaning of claim terms may be established by dictionary definitions. CCS Fitness Inc. v. Brunswick Corp., 288 F.3d 1359, 1366, 62 USPQ2d 1658, 1662 (Fed. Cir. 2002). As might be expected, the word "single" can have a number of different meanings depending on the manner in which it is used. In the context of the appellant's specification and claims, the word "single" clearly characterizes the number of balloons embodied by the appellant's catheter. Hence, customary definitions of "single" such as "consisting of one as opposed to or in contrast with many" or "consisting of only one in number"<sup>2</sup> are reasonable in construing the scope of claim 1, while the more obscure

---

<sup>2</sup>Both of these definitions are from Webster's New Collegiate Dictionary (G. & C. Merriam Co. 1977).

Appeal No. 2005-0943  
Application No. 09/947,943

definition advanced by the examiner is not. Interpreted in this light, the subject matter recited in claim 1 is limited to a catheter having but one balloon, and hence is not met by Sarosiek's disclosure of a catheter having two balloons.

Accordingly, we shall not sustain the standing 35 U.S.C. § 102(b) rejection of independent claim 1, and dependent claims 2 through 9, as being anticipated by Sarosiek.

SUMMARY

The decision of the examiner to reject claims 1 through 9 is reversed.

Appeal No. 2005-0943  
Application No. 09/947,943

REVERSED

CHARLES E. FRANKFORT	)	
Administrative Patent Judge	)	
	)	
	)	
	)	BOARD OF PATENT
JOHN P. MCQUADE	)	APPEALS
Administrative Patent Judge	)	AND INTERFERENCES
	)	
	)	
	)	
JENNIFER D. BAHR	)	
Administrative Patent Judge	)	

JPM/kis

Appeal No. 2005-0943  
Application No. 09/947,943

SHERRILL LAW OFFICES  
4756 BANNING AVENUE  
SUITE 212  
WHITE BEAR LAKE, MN 55110-3205